

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-2087

To be argued by
DIANA GARFIELD

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2087

NORMAN WILCOX,

Appellant,

—v.—

UNITED STATES OF AMERICA,

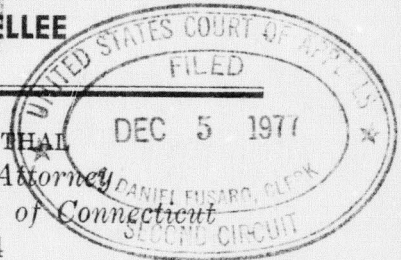
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

RICHARD BLUMENTHAL
United States Attorney
for the District of Connecticut
P. O. Box 1824
New Haven, Connecticut

DIANA GARFIELD
Assistant United States Attorney
District of Connecticut



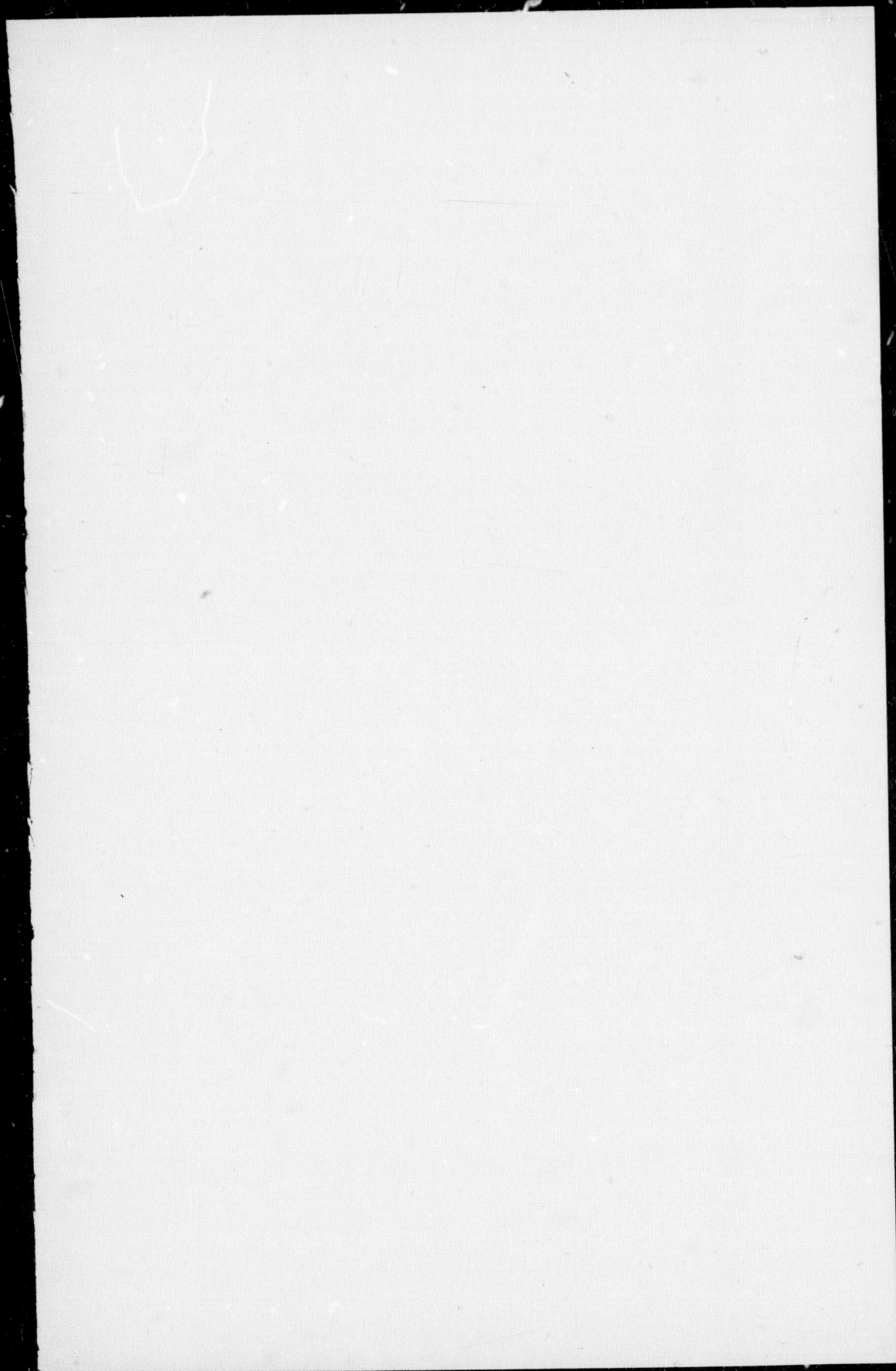


TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Questions Presented	3
Statement of Facts	3

ARGUMENT:

POINT I—The District Court was not required to hold an evidentiary hearing where no material fact necessary for decision was in dispute and the records and files conclusively showed that Wilcox's § 2255 motion was without merit	7
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POINT II—The District Court properly denied the § 2255 motion where the record clearly demonstrated that defense counsel, for reasons of trial strategy, waived his client's right to be present during pre-trial suppression hearings	9
--	---

CONCLUSION	15
------------------	----

TABLE OF AUTHORITIES

<i>Chapman v. United States</i> , 386 U.S. 18 (1967)	9, 10, 14
<i>Dalli v. United States</i> , 491 F.2d 758 (2d Cir. 1974)	8, 9, 10
<i>Evans v. United States</i> , 284 F.2d 393 (6th Cir. 1964)	12
<i>Henry v. Mississippi</i> , 379 U.S. 443 (1965)	11
<i>Mixen v. United States</i> , 469 F.2d 203 (8th Cir. 1972), <i>cert. denied</i> , 412 U.S. 90 (1973)	8
<i>Newfield v. United States</i> , — F.2d —, slip op. 99 (2d Cir. October 19, 1977)	9

	PAGE
<i>Sanders v. United States</i> , 373 U.S. 1 (1963)	9
<i>Silverman v. United States</i> , 556 F.2d 655 (2d Cir. 1977)	8, 11
<i>Taylor v. United States</i> , 487 F.2d 307 (2d Cir. 1973)	8
<i>United States v. Bell</i> , 464 F.2d 667 (2d Cir.), <i>cert. denied</i> , 409 U.S. 991 (1972)	
<i>United States v. Clark</i> , 475 F.2d 240 (2d Cir. 1973)	10, 12
<i>United States v. Crutcher</i> , 405 F.2d 239 (2d Cir. 1968), <i>cert. denied</i> , 394 U.S. 908 (1969)	12
<i>United States v. Franzese</i> , 525 F.2d 27 (2d Cir. 1975), <i>cert. denied</i> , 424 U.S. 921 (1976)	9
<i>United States v. Hester</i> , 489 F.2d 48 (8th Cir. 1973)	9
<i>United States v. Jenkins</i> , 496 F.2d 57 (2d Cir. 1974), <i>cert. denied</i> , 420 U.S. 925 (1975)	2, 3, 13, 14
<i>United States v. Romano</i> , 516 F.2d 768 (2d Cir.), <i>cert. denied</i> , 423 U.S. 994 (1975)	8
<i>United States v. Tortora</i> , 464 F.2d 1202 (2d Cir. 1972)	10, 11
<i>United States ex rel. Allum v. Twomey</i> , 484 F.2d 740 (7th Cir. 1973)	11
<i>United States ex rel. Green v. Rundle</i> , 452 F.2d 232 (3d Cir. 1971)	11
<i>Wainwright v. Sykes</i> , — U.S. —, 97 S. Ct. 2497 (1977)	12
<i>Walker v. Johnson</i> , 312 U.S. 275 (1941)	8
<i>Winters v. Cook</i> , 489 F.2d 174 (5th Cir. 1973) ..	11, 12

**United States Court of Appeals
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Docket No. 77-2087

NORMAN WILCOX,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from an order of the District Court (Newman, J.) denying on the merits that aspect of Wilcox's most recent § 2255 motion concerning waiver of presence at pre-trial hearings.

Wilcox and four codefendants were tried and convicted of the September 25, 1972 robbery of a Danbury, Connecticut branch of the Union Trust Company [18 U.S.C. §§ 2113(a), (b), (d), and 2(a) (b)]. Wilcox and Richard Jenkins were sentenced to eighteen years and Donald Hall to eight years in prison. Lynn Ellen Morrow was sentenced to the custody of the Attorney General for the period of her minority.¹ Their convictions

¹ The District Court granted codefendant James C. Bailey, Jr.'s post-conviction motion for a directed judgment of acquittal.

were affirmed on April 5, 1974, *United States v. Jenkins*, 496 F.2d 57 (2d Cir. 1974),² and *certiorari* was denied on February 18, 1975, 420 U.S. 925 (1975).

On April 17, 1975, Wilcox, later joined by his co-defendants, filed *pro se* petitions for relief pursuant to 28 U.S.C. § 2255 on the ground that their rights under the Sixth Amendment and Rule 43 of the Federal Rules of Criminal Procedure were violated in that they were absent from the courtroom during pre-trial suppression hearings without personally having waived their right to be present. These motions were denied by written opinion on August 5, 1975, without hearing. Wilcox did not appeal from that decision. On December 22, 1975, Wilcox's motion for reconsideration under Rule 60(b) of the Federal Rules of the Civil Procedure was denied.

An appeal from the December order followed, *Wilcox v. United States*, Docket No. 76-2097. By order dated February 8, 1977, this Court (Gurfein, Meskill, *CJJ.* and Bartels, *DJ.*) dismissed appellant's appeal from the District Court's order denying the § 2255 motion for failure to file a notice of appeal within 60 days and affirmed the District Court's order denying appellant's Rule 60(b) motion as within the discretion of that court. Appellant's motion for reinstatement of his appeal was denied by Judge Gurfein on April 19, 1977.

On May 26, 1977, Judge Newman ruled on Wilcox's current § 2255 motion which alleged, *inter alia*, that he was denied proper appellate review because his claim had not been considered on its merits. The District Court then denied on the merits that portion of Wilcox's motion that sought to raise the issue of waiver of presence at

² Morrow's judgment of conviction was remanded to the District Court in order that its form could be made to comply with the Juvenile Delinquency Act, 18 U.S.C. § 5034.

pre-trial hearings so that timely appeal could be effected. On August 3, 1977, Judge Newman granted Wilcox an additional thirty days within which to file a notice of appeal. That notice of appeal was filed on August 3, 1977.

Questions Presented

- I. Whether the District Court was required to hold an evidentiary hearing where no material fact necessary for decision was in dispute;
- II. Whether the District Court erred in holding that defense counsel, for reasons of trial strategy, may waive his client's right to be present during pre-trial suppression hearings.

Statement of Facts

The facts underlying appellant's convictions for bank robbery are summarized in the appellate decision affirming the convictions, *United States v. Jenkins, supra*, and will be discussed only as relevant to the instant appeal.

On March 12, 1973, the District Court heard arguments on motions to dismiss the indictment and began to take evidence on pre-trial suppression motions. Each defendant was represented by separate, court-appointed counsel throughout the suppression hearings which continued on March 13, 16, 26 and 30, and April 10, 1973.

After the conclusion of the argument on the motion to dismiss on March 12, 1973, the Court proceeded to consider the motions for suppression of evidence. Attorney Clifford, Hall's counsel, moved for sequestration of prospective government witnesses. (Tr. 3/12/73, p. 13). Judge Newman asked defense counsel if they wished their clients to be present in the courtroom. Attorney

Clifford declined to have his client present. Other counsel made no response. (Tr. 3/12/73, p. 13). Upon the commencement of the afternoon session that same day, the Court advised defense counsel of a request by the Marshal's Office to return those defendants in custody to their cells if their presence were not required in court. At that time all defendants were in the Marshal's lockup in the courthouse, except for Hall, who was free on bond. Attorney Clifford, Hall's counsel, responded in the negative. (Tr. 3/12/73, p. 22). Attorney Frankel, counsel for Wilcox, indicating his concern that Wilcox would be transferred back to Philadelphia to face other charges, stated:

If he [Wilcox] is going to be available to me over the period of the next couple of days in this jurisdiction, I won't insist on his remaining in the lockup this afternoon. (Tr. 3/12/73, p. 22).

After further discussion about the scheduling of Wilcox's trial date in the Eastern District of Pennsylvania, Judge Newman indicated that Wilcox would remain in Connecticut until the Eastern District of Pennsylvania advised of a definite trial date. The Court then asked: "But, in any event, counsel do not require the attendance of the defendants during this hearing; is that right?" Mr. Frankel replied "That is correct."³ Attorney Oliver, counsel for Morrow, and Attorney Rosen, counsel for Hall, similarly declined to have their clients present. Attorney Sagarin, Jenkins' counsel made no response. (Tr. 3/12/73, pp. 24-26). Mr. Bowman, the Assistant United States Attorney, arranged for the defendants to exit through the back door so that witnesses in the building would not have the opportunity to observe them. (Tr. 3/12/73, p. 25).

³ Mr. Frankel also requested that Judge Newman excuse him briefly to see his client, which request was granted. (Tr. 3/12/73, p. 25).

With one exception, no defendant was again present in the building during the suppression hearings. The exception occurred on March 16, when Wilcox testified in his own behalf concerning events surrounding his arrest on October 15, 1972. (Tr. 3/16/73, pp. 320-337). Prior to his testifying, Wilcox was identified by James P. Tallon, Chief of the Danbury Police Department, as an individual he met at 42A Virginia Avenue, Danbury, on the day of the robbery. (Tr. 3/16/73, p. 235). At the conclusion of his testimony, Wilcox requested that he remain in the courtroom and he was permitted to do so. (Tr. 3/16/73, p. 338).

The final three days of the suppression hearings, March 26, 30 and April 10, involved motions to suppress photographic identifications on the ground that the photo displays were suggestive. On the first of these days, the Assistant United States Attorney represented to the Court that each defense counsel had informed him that he did not want his client to be present. The Court accepted counsel's decision after ascertaining that none of the photo identifications was made in the presence of any defendant. (Tr. 3/26/73, pp. 3-4).

Wilcox's original § 2255 petition to the District Court contended that, although he was transferred to the courthouse for the purpose of pre-trial suppression hearings, he was unaware that the hearings were in progress until the first two days had been completed. Wilcox asserted that he immediately requested that he be present for the remainder of the proceedings,⁴ and that at no time did he waive a known right.⁵

⁴ Wilcox also claimed to have sent a letter to the Court requesting to be present. A search of the file did not reveal this letter.

⁵ Jenkins' petition alleged no specific details except a claim that he had specifically requested to be present at all stages of the proceedings. The petitions filed by Hall and Morrow alleged no details at all.

The Government countered these assertions by sworn affidavits from defense counsel Frankel and Oliver, Chief Deputy United States Marshal Dirienzo and Assistant United States Attorney Bowman, who prosecuted the case. Attorney Frankel stated that he conferred with Wilcox prior to the first suppression hearing and advised him not to be in the courtroom because of the importance of identification testimony and the likelihood that his presence in the courtroom would insure his identification by witnesses. Frankel also asserted that Wilcox did not request to be present until he elected to testify on March 16, and that had he made such a request, he would have been present. Attorney Oliver's affidavit similarly stated that at his request his client was not present in the courtroom. Oliver further recalled at least two conversations by attorneys for all the other defendants to the effect that they did not want their clients present during the suppression hearings so that witnesses would not have an opportunity to observe their clients. Attorney Sagarin, Jenkins' counsel, invoked the attorney-client privilege and declined to disclose his role in the proceedings. However, the affidavit of Marshal Dirienzo stated that Sagarin had advised him of his doubts that defense counsel would want the defendants present in the courtroom during the hearings. Assistant United States Attorney Bowman stated in his affidavit that he informed defense counsel of his intention to ask for in-court identifications of their clients if the defendants were present in the courtroom. He also stated that he advised the Court at the March 26 hearing to suppress photo identifications that all defense counsel had expressed their desire to have their clients absent during that hearing.

The District Court ruled that a hearing was unnecessary since the material facts sufficient for a decision were not disputed. Concluding that the right to be present at pre-trial suppression hearings was not a right so clearly personal that only an on-the-record statement

by the defendant himself could suffice to waive it, the Court held that the record in this case clearly established that counsel waived their clients' right to be present as a matter of trial strategy, a tactical decision binding on their clients and not subject to collateral attack after the convictions. In again denying appellant's current § 2255 motion so that appellant could appeal the prior ruling on the merits, Judge Newman did not amplify his memorandum of decision.

ARGUMENT

POINT I

The District Court was not required to hold an evidentiary hearing where no material fact necessary for decision was in dispute and the records and files conclusively showed that Wilcox's § 2255 motion was without merit.

Wilcox first argues that the District Court erred in dismissing his Section 2255 motion without conducting an evidentiary hearing in his and his codefendants' presence.

Wilcox's Section 2255 petition, unsupported by affidavit or other evidence, alleged that he did not knowingly relinquish or abandon his right to appear at the pre-trial hearings. He also claimed that a letter was sent to the District Court on March 13, 1973, requesting a court appearance.⁶ The Government's response consisted of a memorandum of law and affidavits from participants which, *inter alia*, established counsel's tactical decision to have their clients absent from the courtroom during the

⁶ No evidence of a letter was offered other than Wilcox's claim; a search of the file maintained by the clerk for the District of Connecticut did not reveal any such letter.

suppression proceedings. Wilcox then filed a reply memorandum challenging the Government's use of affidavits under this Court's decision in *Taylor v. United States*, 487 F.2d 307 (2d Cir. 1973). At no time did Wilcox dispute that counsel, as a matter of trial strategy, intended that he be absent to prevent an in-court identification. Instead Wilcox in effect contended that only he could demonstrate such waiver by a personal on-the-record statement.

Judge Newman held that an attorney, even without prior consultation with his client, may waive the client's right to be present at a pre-trial hearing not directly concerned with the determination of guilt. Because counsel's tactical strategy and intention to waive were not disputed by Wilcox and were clearly substantiated by the record, see discussion *infra*, the district court found that an evidentiary hearing was not required, *United States v. Romano*, 516 F.2d 768 (2d Cir.), *cert. denied*, 423 U.S. 994 (1975).

Taylor v. United States, *supra*, does not require a different result. In *Taylor*, the Court found error in a summary rejection of a petition for post-conviction relief which was supported by a *sufficient* affidavit setting forth detailed facts which, if sustained, would require a new trial. However, since *Walker v. Johnson*, 312 U.S. 275, 284 (1941), if the facts necessary for decision are undisputed or incontrovertible, an evidentiary hearing is not required. See also, *Mixen v. United States*, 469 F.2d 203 (8th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973). Mere generalities or hearsay statements will not entitle an applicant to a hearing. *Dalli v. United States*, 491 F.2d 758 (2d Cir. 1974). Appellant's claim of entitlement to a hearing thus fails for two reasons: the petition was unsupported by affidavit or detailed evidence and it raised no material issues of fact necessary for decision. *Silverman v. United States*, 556 F.2d 655 (2d Cir. 1977). Moreover, Judge Newman's decision not to conduct a hearing

resulted from his intimate familiarity with this case after six months of motions and a long trial. As this Court stated in *Newfield v. United States*, — F.2d —, slip op. 99 106 (2d Cir. October 19, 1977) “[t]he language of [§ 2255] does not strip the district courts of all discretion to exercise their common sense.” See also, *United States v. Franzese*, 525 F.2d 27, 32 (2d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976). Where as here, the motion papers and the files and records of the case conclusively showed that Wilcox was entitled to no relief, Section 2255 did not require a hearing. *Sanders v. United States*, 373 U.S. 1, 6 (1963); *Dalli v. United States*, *supra*; *United States v. Hester*, 489 F.2d 48 (8th Cir. 1973).

POINT II

The District Court properly denied the § 2255 motion where the record clearly demonstrated that defense counsel, for reasons of trial strategy, waived his client's right to be present during pre-trial suppression hearings.

Wilcox claims that the conduct of pre-trial suppression hearings in his absence violated the Sixth Amendment and Rule 43 of the Federal Rules of Criminal Procedure. Arguing in effect that only a personal on-the-record statement by a defendant himself could constitute a waiver, Wilcox asserts he was prejudiced by his absence at hearings held on March 12 and 13, 1973.⁷ The totality of the

⁷ A total of six hearings were held. The hearings of March 26, 30 and April 10 concerned photographic identifications out of Wilcox's presence. Because Wilcox would have been unable to assist counsel concerning events occurring out of his presence, his absence from the courtroom during these three hearings would have constituted harmless error beyond a reasonable doubt. *Chapman v. United States*, *supra*. The District Court would

[Footnote continued on following page]

circumstances of this case reveals Wilcox's claims to be without merit.

The Government does not dispute Wilcox's right to be present at pre-trial suppression hearings where evidence was taken. *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973); *United States v. Dalli*, *supra*. There is also no doubt, however, that the right to be present, even at trial, may be waived. *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972). The Government claims that, for tactical reasons, Wilcox's attorney chose to exclude his client from the courtroom and that this decision effectively waived Wilcox's right to be present. Even if the waiver were ineffective, however, the facts of this case reveal that any error resulting from Wilcox's absence was harmless beyond a reasonable doubt. *Chapman v. United States*, 386 U.S. 18, 21 (1967).

The instant case is unusual in that the record so clearly shows that all defense counsel involved in this multi-defendant case intended that their clients be absent from the hearings in order to prevent in-court identifications by witnesses. (Tr. 3/12/73, pp. 13, 22-26; Tr. 3/26/73, pp. 3-4). It must also be noted that although Wilcox claims to have written to Judge Newman requesting to be present, a letter never found in the files, Wilcox at no time voiced any objection to his exclusion when he appeared at the suppression hearing on March 16, 1973,⁸ or when the District Court rendered its written decision on the pre-trial motions, or at trial, or on appeal. This inaction certainly undermines Wilcox's assertion that he

have so held if it had been necessary to reach this question. Wilcox was in Court for the entire March 16 hearing. Thus the only hearings from which Wilcox was absent were those on March 12 and 13.

⁸ Wilcox's request to remain in Court following his testimony was granted (Tr. 3/16/73 p. 338). By that time he had already been identified by the Danbury Chief of Police.

disagreed with counsel's decision to waive his right to be present. See *United States v. Tortora, supra*, (waiver of right to be present may be implied from defendant's conduct.) Indeed, counsel's fears of in-court identification were fully borne out when Wilcox was identified by the Danbury Chief of Police at the March 16 hearing.

Where, as here, Wilcox's exclusion from the courtroom was so clearly a considered choice by counsel for the benefit of his client, Wilcox should be bound by his attorney's decision.

Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client.

Wainwright v. Sykes, — U.S. —, 97 S. Ct. 2497, 2510 (1977) (Burger, C.J., concurring); *Silverman v. United States, supra*, 556 F.2d at 658; *Winters v. Cook*, 489 F.2d 174, 176 (5th Cir. 1973) (*en banc*); *United States ex rel. Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973) (Stevens, J.); *United States ex rel. Green v. Rundle*, 452 F.2d 232 (3d Cir. 1971); cf. *Henry v. Mississippi*, 379 U.S. 443, 451-52 (1965) (decisions of counsel relating to trial strategy, even when made without consultation of the defendant, would bar direct federal review of claims thereby foregone, except where circumstances are exceptional).

Furthermore, the right to be present at a pre-trial suppression hearing has not been held to be within that group of rights so clearly personal that only an on-the-record statement by the defendant himself may effectively

waive it. As stated by Chief Justice Burger in his concurring opinion in *Wainwright v. Sykes*, *supra*, 97 S. Ct. 2510, n. 1:

Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make.

Compare *United States v. Crutcher*, *supra* (right to be present when jury empaneled); *Evans v. United States*, 284 F.2d 393 (6th Cir. 1964) (right to be present when trial judge gives additional instructions to jury), with *Winters v. Cook*, *supra*, (attorney may waive client's constitutional objection to racial composition of grand jury). See generally, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1111 n. 102.⁹

⁹ Appellant's reliance on *United States v. Clark*, *supra*, a "hijacker profile" case, is inappropriate. In *Clark*, the Government moved to exclude the defendant from an entire pre-trial suppression hearing in order to protect the secrecy of the hijacker profile used to screen air travelers. This Court's holding that such exclusion was plain error resulted from factors totally lacking in the instant case: testimony given later at trial indicated that defendant's counsel may have been unaware of facts that could have led to a contrary resolution of the suppression motion; there were no compelling circumstances justifying the search in question; there was no convincing evidence of counsel's intent to waive appellant's right to be present; the defendant's silence *in absentia* could not be construed as knowing waiver. In the case at bar, the Government at no time sought to exclude Wilcox from the hearings. Rather, the Government produced Wilcox at the courthouse on March 12, 1973 and kept him there until defense counsel indicated that his presence was not required. Thus, it was clear that counsel did not want Wilcox present for tactical reasons benefitting his client. Furthermore, Wilcox voiced no objection to his exclusion when he did appear in Court. Finally the search contested was fully justified by compelling circumstances and no facts later emerged which would have changed the outcome of the suppression hearing.

Wilcox's claim of prejudice emanates from his absence during the testimony of New Jersey State Trooper Fedorko, who arrested him after finding a concealed weapon in the saddlebag of his motorcycle. Subsequent investigation of Wilcox's money revealed several bills stolen from the Union Trust in Danbury. Wilcox also argues that, since he was present at 42-A Virginia Avenue, Danbury, when law enforcement officials gained entrance to the premises, he would have disputed the voluntariness of Mrs. Gary's consent to enter the premises.¹⁰ Examination of the factual background of these claims of prejudice reveals them to be frivolous.

Wilcox contends that he was severely prejudiced because he was unable to point out to his counsel that Trooper Fedorko erred as to the time that he stopped Wilcox on the highway and because he was unable to explore with counsel a possible "harassment of a biker" defense to the initial stop. Appellant also claims that he failed to cover one point in his own testimony about the sequence of events before the search as clearly as he would have had he been present during Fedorko's cross-examination, namely that he gave Fedorko a bill of sale for the motorcycle along with his license.

Judge Newman's memorandum of decision on Wilcox's suppression motion noted that there was "some variation as to the sequence of events between the testimony of Wilcox and the officer who made the search There is not even a consistent version in the testimony of the state trooper." Thus, the District Court was fully cognizant of the variations in Fedorko's testimony. There was no disagreement, however, that the bike upon which Wilcox was traveling had a cardboard license plate.

¹⁰ It must be noted that each of these issues was fully litigated on direct appeal, *United States v. Jenkins*, *supra*, 496 F.2d at 71-73.

Wilcox argues that, if present, he could have disputed Fedorko's testimony that he stopped Wilcox during the day. Yet, Judge Newman evaluated the reasonableness of the stop as if it occurred at night, as Wilcox claims. Given the District Court's express notation of the inconsistencies in the trooper's testimony and resolution of the question of the time of the stop in Wilcox's favor, no prejudice resulted from Wilcox's absence from the courtroom. Wilcox's claim of a "harassment of a biker" defense is untenable in light of the hand-lettered cardboard license plates on the motorcycle.

Wilcox also argues that because he was not present during the cross-examination of Trooper Fedorko, he was prejudiced by his inability to clarify his own testimony as to the sequence of events prior to the search. Wilcox claims that since he gave a bill of sale to the trooper along with a valid license, his lack of a registration certificate would not support a reasonable belief that the motorcycle was stolen, justifying the search. Wilcox rather disingenuously fails to disclose that his valid license was in the name of William Fuller, while the bill of sale was from a distributor to James C. Bailey. Thus, rather than lessening a reasonable belief that the motorcycle was stolen, Wilcox's production of the bill of sale heightened it, fully justifying the search.

Finally, Mrs. Gary herself testified that she freely consented to the officials' looking anywhere they wanted. See *United States v. Jenkins, supra*, 496 F.2d at 72. In short, any error resulting from Wilcox's absence from the courtroom during the March 12, 13 suppression hearings was harmless beyond a reasonable doubt. *Chapman v. United States, supra*.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

RICHARD BLUMENTHAL
*United States Attorney
for the District of Connecticut
P. O. Box 1824
New Haven, Connecticut*

DIANA GARFIELD
*Assistant United States Attorney
District of Connecticut*

United States Court of Appeals
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APPELLANT

v.
U. S. A.,
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AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue,
Brooklyn, New York

That on the 5th day of December, 1977, deponent served the within Brief and Appendix
upon Norman Wilcox, Leavenworth Penitentiary, Leavenworth, Kansas 66048

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Albert Sensale

This 5th day of December, 197 7

Patricia D. O'Hara
Notary Public, State of New York
No. 31-4654987
Qualified in New York County
Commission Expires March 30, 1979

Patricia D. O'Hara

